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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 636

WILLIAM H. WOOD, and MILDRED J. BLUE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorables: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, William H. Wood and Mildred J. Blue, pray that the writ of certiorari issue to review the Judgment of the Circuit Court of Appeals for the District of Columbia Circuit, entered on the 1 day of November, 1962.

OPINION BELOW

Below there was no Opinion.

There was an Order as follows:

On consideration of petitioners' petition for allowance of an appeal from the Municipal Court of Ap-

peals, of petitioners' brief in support thereof, and of respondent's brief in opposition thereto, it is

ORDERED by the Court that the petition is hereby denied.

Per Curiam

Dated: Nov 1 1962

JURISDICTION

The jurisdiction of this Court is asserted under the provisions of 28 U.S.C. 1254 (1).

The judgment sought to be reviewed is dated November 1, 1962.

QUESTIONS PRESENTED FOR REVIEW

Where, in a prosecution for the criminal offense of keeping a bawdy house, then counsel for petitioners elected not to test the validity of a search and seizure through the medium of a pre-trial motion to suppress, and during the presentation of the government's case objection is made to certain seized evidence upon the ground of illegal search and seizure,—

Was it error for the trial court to decline to consider the question upon the ground no pre-trial motion to suppress had been filed, the posture of the case then being:

1. Proof elicited had established no violation of law was observed by the arresting officers.

2. Proof elicited had established the search was general, exploratory and designed to produce evidence for use in a prosecution, only.

3. The state of the record at that time, and at all times thereafter during the trial established there was no record that any warrant had ever been issued—notwithstanding the testimony of a government police witness

tended to persuade that the police acted under authority of an arrest warrant.

Concisely—Where the government, in response to a claim that evidence sought to be utilized against the defendant, has been obtained in violation of the command of Amendment IV., of the Constitution, stands upon the proposition that a legally sufficient warrant had been properly issued and legally executed, and there is no record of the existence of any arrest or search warrant, can a conviction predicated upon articles so seized be permitted to stand?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V. Rights of persons.

No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

AMENDMENT IV. Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTES INVOLVED

District of Columbia Code. 22–2722. Keeping Bawdy or Disorderly House.

Any person convicted of keeping a bawdy or disorderly house shall be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or both.

Judges may issue warrants returnable to police court—Record.

Any judge of the municipal court may at any time, including Sundays and legal holidays, on complaint under oath or actual view, issue warrants returnable to the police court against persons accused of crimes and offenses committed in the District of Columbia, and he shall make a record of his proceedings in every case in a book to be kept for that purpose. Such warrants shall be issued free of charge. * * * District of Columbia Code 11—705.

RULES OF COURT INVOLVED

RULES OF COURT INVOLVED:

Municipal Court of the District of Columbia. Rule 13. Application of Federal Rules of Criminal Procedure.

The Federal Rules of Criminal Procedure shall apply to all proceedings in the criminal division of this court in which the judges are acting as committing magistrates.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 3. The Complaint. The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons Upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *.

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or,

if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons. The Summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return.

(1) By whom. The warrant shall be executed by a marshal or by some other officer authorized by law. * * *.

* * * * *

(3) Manner. The warrant shall be executed by the arrest of the defendant. * * *.

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5.

STATEMENT OF THE CASE

Pursuant to complaints made by persons dwelling in the neighborhood of a tourist home operated by petitioner William H. Wood, and wherein petitioner Mildred J. Blue was an employee, an investigation was made by police to determine if the tourist home was in fact a disorderly or bawdy house.

Eventually one William R. Dixon, Metropolitan Police Officer, District of Columbia, and four additional persons appeared before an assistant United States District Attorney in the District of Columbia and executed a document which purports to be an affidavit supporting an application for issuance of a warrant.

This document was subscribed and sworn to before the assistant United States District Attorney.

Being, in part, on an official printed form which concludes as follows:

~~SUBSCRIBED AND SWORN BEFORE ME THIS DAY OF IN THE YEAR 1961.~~

~~HONORABLE JUDGE~~

WITNESSES:

William R. Dixon
Detective William R. Dixon, 12 pct
Mrs. Crepla Moore
Mrs. Joseph I. Moore,
Joseph I. Moore
James Moore

Subscribed and sworn to before me this 1st day of July, 1961.

/s/ HAROLD J. SULLIVAN
Harold J. Sullivan
Asst U.S. Atty.

See record bearing numbers pages 322 to 325, inclusive in the court below.

There can be no dispute that the purported supporting affidavit was neither sworn to, subscribed before, nor ever considered by a judicial officer. That portion of the document having reference to judicial action was stricken by the government.

Below, petitioners called for the entire record including any and all documents relating to issuance of any warrant.

No warrant is in the record.

No copy of warrant is in the record.

No compliance with the command of Title 11 section 705, District of Columbia Code commanding that a judge

issuing a warrant "shall make a record of his proceedings in every case in a book to be kept for that purpose. * * *", is established by the record—and the inescapable deduction must be that no judge issued a warrant, wherefore no record exists.

There could be no entry into and upon the premises in question absent a warrant.

There could be no seizure of articles taken from such premises and introduced into evidence against petitioners absent seizure pursuant to authority of a warrant.

ARGUMENT

Where there is a dispute as to judicial procedures in a given cause the record furnishes the proof. In Schmidt v. Esquire, Inc., 210 F. 2d 908, 914, the Court said, in part:

> (11) The court in which this bankruptcy proceeding was pending was, of course, a court of record. It acts only through its orders which are made of record. It could approve the abandonment of these causes of action only by an order duly entered. Since no such order was entered the court did not approve the abandonment.

In McDonald v. Crawford, 180 So. 130, 131, 28 Ala. App. 163, it is said:

> (1,2) It is a rule, and the only safe one, says Stone, Judge, that in judicial proceedings nothing is to be left to unrecorded memory. The record must speak by and for itself, without the aid of oral proof or human recollection. * * *. The record must be so complete that a succeeding officer, coming into the place of the one before which the business was transacted, cannot reasonably mistake what was done.

There is no help available through any presumption that public officials do their duty as was supposed by the ap-

pellate court below. In Stone v. Stone 136 F. 2d 761, 763, ... App. D.C. ..... this Court stated:

> (4) * * * In an action which challenges the conduct of a public officer, a presumption of law is indulged in his favor that his official duties were properly performed. Like other such presumptions, it disappears so soon as substantial countervailing evidence is introduced.

Evidence obtained through search following illegal arrest is inadmissable.

This Court, approving an opinion of the appellate court below, held in U.S. v. Blek, 188 F. 2d 1019, 88 U.S. App. D.C. 326, 327:

> (1) Petty larceny is not a felony and the alleged offense was not committed in the officer's presence. The arrest was illegal and did not justify the search.

The illegality of the arrest and search and seizure ousted jurisdiction.

In Johnson v. Zerbst, 304 US 458, L ed 1461, 1468, we learn:

> (5) Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this Constitutional mandate is an essential prerequisite to a Federal court's authority to deprive an accused of his life or liberty. * * * A court's jurisdiction * * * may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.

It cannot be argued that the rights guaranteed by the Fourth and Fifth Amendments are not subject to and covered by the same rule.

It was error to refuse to inquire into the legality of arrest and search.

In Gouled v. United States 265 U.S. 298, 65 L ed 647, 654, the Court said:

> * * * Where in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

REASONS WHY THE WRIT SHOULD ISSUE

The Court below has decided the question relating to the issuance of a warrant contrary to the rules of Court, contrary to established decisions relating to the issuance of warrants, and in so doing has so far departed from the accepted usual course of judicial procedures and so far sanctioned such a departure by the trial court as to require an exercise of this Court's power of supervision, and such sanction relates to constitutional guarantees, procedure and application of the substantive law involved.

In the strict legal sense the proceedings below are void.

CONCLUSION

This Court will doubtless take judicial notice that the Police Department in Washington, D.C. is openly, blatantly and publicly committed to the proposition that Supreme Court Rulings which tend to interfere with the easy enforcement of law are evil and should be obeyed only to the minimum degree. It would appear, therefore, that it would be fitting and proper for this Court to emphasize the fact Constitutional Guarantees respecting the liberty and freedom of the citizen must be respected and obeyed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

Municipal Court of Appeals No. 3016

United States Court of Appeals for the District of Columbia Circuit Filed November 1, 1962
Joseph W. Stewart, clerk

No. 17,259

WILLIAM H. WOOD and MILDRED J. BLUE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Before: Danaher, Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of petitioners' petition for allowance of an appeal from the Municipal Court of Appeals, of petitioners' brief in support thereof, and of respondent's brief in opposition thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: November 1, 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 636

WILLIAM H. WOOD, AND MILDRED J. BLUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a petition for allowance of an appeal from the Municipal Court of Appeals (Pet. 11) is not reported. The opinion of the Municipal Court of Appeals (Tr. 329) is not reported.

JURISDICTION

The order of the court of appeals was entered on November 1, 1962. By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to December 8, 1962. The petition was filed on December 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that an arrest warrant could not be found at the time of appeal establishes that the arrest of petitioners and a search incidental thereto were illegal, although the only testimony adduced at the trial was that the arresting officer had acted under a valid warrant and petitioners did not contend at trial that no arrest warrant existed.

STATUTE INVOLVED

Section 705 of Title 11 of the D.C. Code provides:

> Any judge of the municipal court may at any time, including Sundays and legal holidays, on complaint under oath or actual view, issue warrants returnable to the criminal division against persons accused of crimes and offenses committed in the District of Columbia, and he shall make a record of his proceedings in every case in a book to be kept for that purpose. Such warrants shall be issued free of charge.

STATEMENT

Petitioners were convicted of operating a disorderly house in the District of Columbia and were sentenced to imprisonment for 60 days (Tr. 307). The Municipal Court of Appeals affirmed the convictions (Tr. 329) and the Court of Appeals denied a petition for allowance of an appeal to that court (Pet. 11).

At the trial, neighbors of petitioner Woods' "tourist home" testified that most of the patrons came in cars with local license plates; that they did not carry luggage; that they remained only an hour or two; that the house was frequently noisy all night; and that

whiskey bottles were thrown in the yards of the neighbors (Tr. 6–15, 27–33, 39–48, 79–83, 113, 120–124, 152–156, 174–182). Two police officers testified that on separate occasions on June 22 and June 30, 1961, each, wearing plain clothes and accompanied by a female policewoman in plain clothes, went to the house, was admitted by Miss Blue who asked the time for which the room would be used. When the officer answered that it would be for an hour or an hour and a half, he was told the cost would be $2.58, which he paid in advance. Each of the rooms occupied by the officers contained one bed (Tr. 55–64, 100–1005).

Officer Dixon testified that on June 27, 1961, in the parking lot of the house, he saw only automobiles with D.C. plates except for one with Virginia plates (Tr. 185). On July 1, 1961, he obtained a warrant of arrest which he and others executed at the house about midnight (Tr. 73, 186). The officers found and seized registration cards on a shelf near the registration desk, in a desk in the rear of the establishment, and on a shelf near the kitchen (Tr. 196–197). The government introduced in evidence the registration cards for the period from June 4 to July 1. None of the cards showed a charge of $6.00, the fee for one night. A number of them showed that the rooms had been rented more than once on the same day (Tr. 210–212).

Subsequently, toward the end of the trial, petitioners' counsel moved to suppress the evidence as to the cards (Tr. 228–229), contending that the registration cards were not the instrumentalities of a crime and

were not subject to seizure.' Counsel also said that Officer Dixon had apparently secured the arrest warrant simply on the basis of his observation that only cars with D.C. license plates were parked in the parking lot of the establishment and that this was not sufficient probable cause for issuance of the warrant (Tr. 229–231). The government stated that there had been other evidence to support the warrant which had not been produced since no motion to suppress had been made (Tr. 231–235). The court denied the motion noting that Officer Dixon had testified that his personal observations were not the sole basis for the warrant (Tr. 235).

On appeal petitioners included in the record the supporting affidavit accompanying the request for the arrest warrant; it had been subscribed and sworn to before an assistant United States Attorney by Officer Dixon and a number of other persons (Tr. 322–323). The Municipal Court of Appeals held that the information contained in the affidavit constituted probable cause for the issuance of a warrant of arrest. In response to the argument of petitioners' counsel that the affidavit had not been seen by the judge who issued the warrant, the court held that, in the absence of any proof to the contrary, it would assume that the affidavit had been read and considered in regular course (Tr. 329). In a petition for rehearing, petitioners questioned whether a judge had issued the warrant in compliance with 11 D.C. Code 705 (Tr. 331–336).

ARGUMENT

As we understand petitioners' argument it is that, since the arrest warrant could not be found when the supporting affidavit was included in the record on appeal, this Court should now assume that no judge issued the warrant and that the arrests were illegal, with the result that the incidental search was invalid. This argument presents no issue warranting further review. Officer Dixon testified that he made the arrest under a warrant. (Tr. 186). Petitioners, even though they belatedly moved to suppress the registration cards on other grounds, never claimed at trial that no warrant had been issued, although the government's witnesses testified that petitioners had been arrested under the authority of a warrant. Had any issue been raised as to whether the officer did have a warrant, the facts could then have been explored. However, since no issue was raised, there was no occasion for the government to produce the warrant or warrant book in court,[1] nor, assuming that the warrant had been lost at that time, to produce other evidence that the warrant had been issued. Having thus failed to raise the issue at a time when the facts could have been adduced, petitioner cannot now complain that the facts were not developed at the trial. See *Giordinello* v. *United States*, 357 U.S. 480, 488.

[1] The United States Attorney in his brief below stated that an entry as to the warrant in question does appear in the Warrant Issue book in the Warrant Office of the Municipal Court. At the least, this indicates that the supporting affidavit had been submitted to the court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1963.

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